

REMARKS

Claims 26 – 46 were examined, and all were rejected. Claims 26 and 32 have been amended to more particularly point out and distinctly claim subject matter that the inventor regards as the invention. Claims 26 – 46 remain pending in this application.

A paragraph has been added reciting a cross reference to the related PCT application from which this application takes priority.

Headings have been added to the specification as appropriate.

No new matter has been introduced into the application by these amendments.

A Supplemental Information Disclosure Statement is being filed concurrently with this response.

Claim Rejections - 35 USC § 112

Claims 31 – 32 and 35 – 36 were rejected under 35 UCS § 112 ¶2 as being allegedly indefinite. The rejection is traversed with regard to the claims as currently presented.

Claim 31 allegedly has no antecedent basis for the phrase “the step of introducing liquid foodstuff” in line 3. That is incorrect. As provided by MPEP 2173.05, “the failure to provide explicit antecedent basis for terms does not always render a claim indefinite. If the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite. Energizer Holdings Inc. v. Int'l Trade Comm'n, 435 F.3d 1366, 77 USPQ2d 1625 (Fed. Cir. 2006).” Here, claim 31 depends from claim 26, which contains the step of “introducing a foodstuff into the container.” Claim 31 further recites “wherein, if the introduced foodstuff is substantially entirely liquid in state.” One of ordinary skill in the art would easily be able to ascertain that “the step of introducing liquid foodstuff” refers to the step of introducing a foodstuff into the container, as recited in claim 26, wherein the introduced foodstuff is substantially entirely liquid in state, as recited in claim 31. Therefore, claim 31 is not indefinite, and the section 112 rejection of claim 31 is not supported.

Claim 32 allegedly has no antecedent basis for two phrases contained in the claim. Those phrases have been amended.

Claim 35 allegedly has no antecedent basis for the phrase “the open end”. Claim 26, from which claim 35 depends, has been amended to provide antecedent basis for that phrase.

Although not explicitly stated, claim 36, which depends from claim 35, is understood to have been rejected as depending from claim 35, which was rejected under section 112. As noted above, since the alleged insufficient antecedent basis in connection with claim 35 has been corrected, claim 36 has been corrected as well.

Reconsideration and withdrawal of the section 112 rejections of claims 31 – 32 and 35 – 36 are respectfully requested.

Claim Rejections - 35 USC § 102

Claims 26 – 30, 33, 35 – 36, 38, 43 – 44, and 46 were rejected under 35 UCS § 102(b) as being allegedly anticipated by Schulze (US 3,708,952). The rejection is traversed.

Claim 26 as currently presented recites:

A method of filling a flexible-walled container having an open end, comprising the steps of:

- (i) purging substantially all oxygen from the interior of the container by introducing an inert gas;
- (ii) introducing a foodstuff into the container;
- (iii) over-inflating the container with inert gas beyond a desired volume;
- (iv) subsequently removing a selected volume of the inert gas from the container to leave a selected volume remaining in the container; and
- (v) sealing the container.

Schulze discloses steps i), ii) and v); however, there is no disclosure of method steps iii) and iv) as such.

In paragraph 13 of the Office Action, the Examiner refers to col. 4, lines 63-68 and says that “The bleeding of carbon dioxide from the pouch is being interpreted as the removal of a select volume of inert gas.” This is not a valid interpretation of Schulze. What is actually said in lines 63-68 is “During the time each pouch 10 is clamped to splitter bar 21 and is being filled, some carbon dioxide escapes or bleeds upwardly from the upper end of the pouch as a result of the pouch being somewhat overpurged with carbon dioxide.”

The term “overpurged”, when read in conjunction with the rest of the description and drawings in Schulze, can only be taken to disclose that as the carbon-dioxide is pumped into the pouch it gradually escapes from the top of the pouch. “Overpurged” cannot be equated to “over-inflating” because there is no disclosure at all of the pouch being over-inflated (i.e., inflated to a

volume which is greater than the desired end volume - as it is defined at page 8, lines 8 to 11 of the published international application). "Overpurged" in this context therefore can only mean that more gas than is required is pumped into the pouch and that the excess gas escapes from the top of the pouch; there is no disclosure of the pouch increasing in volume (or "over-inflating") at this, or any other stage. The pouch of Schulze will therefore be mostly flat at the beginning of the process, and will be inflated to its final volume whilst being over-purged with gas during filling with foodstuffs and will then be sealed at the end of the filling process at that volume. In contrast, the pouch of claim 26 will be mostly flat at the beginning of the process, will be over-inflated to a volume greater than its final volume during filling of the pouch, will then be reduced to its final volume once filled with foodstuffs and will then be sealed at the end of the filling process at the reduced final volume. This distinction is important because it is the steps of over-inflating followed by a reduction in volume which, unlike Schulze, allows the final volume to be manipulated as required (discussed below). Therefore step iii) is not known from Schulze.

Second, the continual nature of the overpurging in Schulze means that the stepwise nature of steps iii) and iv) is not shown. In other words, the gas escapes from the pouch in Schulze simultaneously as the gas is pumped into the pouch, rather than subsequently being removed as required by step iv) of claim 26.

Third, Schulze does not disclose the removal of a selected volume of the inert gas from the container to leave a selected volume remaining in the container. By contrast, a random and uncontrolled amount of gas escapes from the top of the pouch in Schulze. This is evidenced by the indefinite language used in Schulze such as "some carbon dioxide"; "escapes"; "bleeds"; "somewhat overpurged". Removal of a selected volume of gas provides a fundamental difference between claim 26 and Schulze because it is the exactness of this step which ensures that exactly the correct amount of inert gas remains in the sealed pouch to provide the stated advantages of the pouch being less rigid, less processed and having an enhanced on-shelf appearance (page 9, lines 19-21 of the published international application) as well as reduced agglomeration of the pouch contents (page 10, lines 5-6). Therefore step iv) not present in Schulze. Claim 26 is therefore clearly novel over Schulze.

Because Schulze does not disclose or suggest all the elements of claim 26, Schulze cannot anticipate that claim under 35 USC § 102(b), and claim 26 is allowable over Schulze. Furthermore, a dependent claim comprises all of the features of its base claim. Here, claims 27 -

30, 33, 35 – 36, 38, 43 – 44, and 46 all depend from claim 26. Therefore, without prejudice to their own individual merits, those claims are also deemed allowable for at least the same reasons as their base claim.

Based on the arguments presented above, reconsideration and withdrawal of the 35 USC § 102(b) rejection of claims 26 – 30, 33, 35 – 36, 38, 43 – 44, and 46 are respectfully requested.

Claim Rejections - 35 USC § 103

For an invention to be obvious, 35 USC §103(a) requires that

... the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

To establish a *prima facie* case of obviousness, the Office must use the framework for determining obviousness set forth in *Graham v. John Deere Co.*, 383 US 1, 148 USPQ 459 (1966). That framework consists of determining the scope and content of the prior art; ascertaining the differences between the prior art and the claims at issue; and resolving the level of ordinary skill in the pertinent art. Secondary considerations such as commercial success, long felt but unsolved needs, failure of others, etc., may also be evaluated by the Office to give light to the circumstances surrounding the origin of the claimed subject matter. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 US 398 (2007) affirmed the applicability of the framework laid down in *Graham*.

Claims 31, 32, 34, 37, 39, 40 – 42, and 45, were rejected under 35 USC § 103(a) as being allegedly unpatentable over Schulze in view of Laudenberg (US 6,199,601), Fang (US 4,736,572), Wilson (US 4,027,456), Kühnle (US 3,813,847), and/or Shima (US 4,891,007). These rejections are traversed with regard to the claims as currently presented.

Claims 31, 32, 34, 37, 39, 40 – 42, and 45 all depend from claim 26, and it is noted that the cited references (except for Schulze) are relied on only for the additional features of those claims. However, those references do not supplement claim 26 to provide all of the features of claim 26 missing from Schulze, as discussed above. In particular, steps iii) and iv) of claim 26 are not hinted at or suggested by Schulze, nor are these steps disclosed, hinted at or suggested by any of the other prior art documents. Therefore, combining Schulze and any or all of the other

cited references as suggested by the examiner does not render the claims obvious. Accordingly, the section 103 rejection of claims 31, 32, 34, 37, 39, 40 – 42, and 45 is not supported and, without prejudice to their own individual merits, they are allowable over the cited references for at least the same reasons claim 26 is allowable over Schulze alone.

Furthermore, a person of ordinary skill in the art considering the teaching of Schulze would be positively dissuaded from arriving at the invention of claim 26 by the simultaneous, continual, and inexact “overpurging” methodology promoted by Schulze, as opposed to the stepwise and exact over-inflating and subsequent gas removal method defined in claim 26.

Claim 26 is therefore clearly inventive over the prior art.

Based on the arguments presented above, reconsideration and withdrawal of the section 103 rejection of claims 31, 32, 34, 37, 39, 40 – 42, and 45 are respectfully requested.

Conclusion

No other matters remain. In view of the foregoing amendment and remarks, applicants respectfully submit that the present application, including claims 26 – 46, is in condition for allowance and an early notice of allowance is respectfully requested.

Respectfully submitted,

Kenneth Parry, et al.

BY:


GRÉGORY J. LAMORGNA
Registration No. 30,469
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
Tel: 215-988-3309
Fax: 215-988-2757
Attorney for Applicant